



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

The Mutuality of Obligations Doctrine and Termination of the Employment Contract

Citation for published version:

Cabrelli, D 2014, 'The Mutuality of Obligations Doctrine and Termination of the Employment Contract: *McNeill v Aberdeen City Council (No 2)*', *Edinburgh Law Review*, vol. 18, no. 2, pp. 259-65.
<https://doi.org/10.3366/elr.2014.0209>

Digital Object Identifier (DOI):

[10.3366/elr.2014.0209](https://doi.org/10.3366/elr.2014.0209)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Edinburgh Law Review

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



managerialism in legal proceedings,²³ but we could explore more principled reasons for reform based on the lessons of psychology. For instance, would it be better to gain evidence from witnesses as soon as possible before memory fades and/or is altered by external and internal influences? Should we allow both trial and appeal courts to read and reread transcripts in an atmosphere unaffected by the drama and tensions of the courtroom and the pressure to make instant and final decisions? Whatever the merits of various suggestions for reform, the issue of witness demeanour illustrates a more general problem with much of Anglo-American legal procedure and evidence law, namely their basis in “armchair psychology”²⁴ or “fireside inductions”²⁵ about how the human mind works.²⁶ It seems appropriate to conclude that, if we are serious about ensuring a fact-finding system which maximises its ability to ascertain accurate facts, we need to pay more heed to the results of those who study human behaviour using accepted research methods.

Donald Nicolson
University of Strathclyde

EdinLR Vol 18 pp 259-265

DOI: 10.3366/elr.2014.0209

The Mutuality of Obligations Doctrine and Termination of the Employment Contract: *McNeill v Aberdeen City Council (No 2)*

The decision of the Inner House in *McNeill v Aberdeen City Council (No 2)*¹ underscores the extent to which the doctrine of mutuality of contractual obligations in Scots contract law occupies vital territory in the Scots common law regulating the termination of the contract of employment. As such it has implications both for contract law and for the shape of employment law in Scotland, particularly in relation to an employee’s statutory right to terminate the employment contract and claim compensation from the employer pursuant to the statutory concept of constructive dismissal in section 95(1)(c) of the Employment Rights Act 1996 (“ERA”). It provides an additional example of a divergence of approach between the common law of the

23 See J McEwan, “From adversarialism to managerialism: criminal justice in transition” (2011) 31 Legal Studies 519.

24 D Luban, *Lawyers and Justice: An Ethical Study* (1988) 69.

25 P E Meehl, “Law and the fireside inductions: some reflections of a clinical psychologist” (1971) 27 J of Social Issues 65.

26 See the series of early studies by Hutchins and Slesinger, discussed in D Carson, “Psychology and law: a subdiscipline, an interdisciplinary collaboration or a project” in Bull and Carson (n 17).

1 [2013] CSIH 102, [2014] IRLR 113.

contract of employment in Scots and English law.² In this article the relationship between the mutuality of obligations doctrine in Scots law and the content of the implied terms of the contract of employment is examined, as are the implications of the decision for statutory constructive dismissal claims.

A. THE FACTS AND THE DECISION

A claim for constructive dismissal under section 95(1)(c) of the ERA entails the application of a curious amalgam of traditional common law doctrine and self-contained statutory techniques. This statutory provision directs that an employee is constructively dismissed by his employer if the employee terminates the employment contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. Pursuant to the decision of the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp*,³ if an employee is able to show that the employer's conduct amounted to a repudiatory breach going to the root of the contract of employment this will be sufficient for the employee to establish constructive dismissal under section 95(1)(c). As such, the statutory constructive dismissal concept was hung on the coat-tails of orthodox common law principles under the law of contract. Subsequent to *Western Excavating*, it was held that a fundamental breach of an express term, or a common law implied term, of the contract of employment by the employer would be considered sufficiently serious to entitle the employee to a finding of constructive dismissal.⁴ Since the authorities demonstrate that a breach of the common law implied term of mutual trust and confidence ("ITMT&C") is automatically repudiatory,⁵ the effect is that a breach by the employer will amount to a statutory constructive dismissal.⁶

In *McNeill* the employee claimed that he had been constructively dismissed under section 95(1)(c) on the ground that his employer had committed a repudiatory

2 In English law, an employer is prevented from curing a repudiatory breach of the contract of employment, whereas this is possible in Scots law; cf *Buckland v Bournemouth University Higher Education Corp* [2011] QB 323 at 333H-336E with the Scottish decisions in *Barclay v Anderson Foundry Co* (1856) 18 D 1190, *Lindley Catering Investments Ltd v Hibernian Football Club Ltd* 1975 SLT (Notes) 56, *Strathclyde R C v Border Engineering Contractors Ltd* 1998 SLT 175, *Morrison and Mason v Clarkson Bros* (1898) 25 R 427, 5 SLT 277, *Millars of Falkirk Ltd v Turpie* 1976 SLT (Notes) 66 and *Magnet Ltd v John Cape t/a Briggate Investments*, Sheriff Evans, Cupar Sheriff Court, 19 July 2007. Moreover, in Scots law the Unfair Contract Terms Act 1977 applies to exclusion and limitation of liability clauses in employment contracts (*Chapman v Aberdeen Construction Group plc* 1993 SLT 1205), whereas this is not the case in English law by virtue of the decision of Lord Justice Mummery in *Keen v Commerzbank AG* [2007] ICR 623. These are just some examples of a divergence of approach.

3 [1978] QB 761.

4 M Freedland, *The Personal Employment Contract* (2003) 155-156; L Barmes, "Common law implied terms and behavioural standards at work" (2007) 36 Industrial LJ 35 at 37-38.

5 *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 at 86 per Arnold J; *Woods v W M Car Services* [1981] ICR 666 at 672 per Browne-Wilkinson J; *Morrow v Safeway's Stores* [2002] IRLR 9; and *Amnesty International v Ahmed* [2009] IRLR 884 at para 70.

6 *Eastwood v Magnox Electric plc (and McCabe v Cornwall County Council)* [2004] IRLR 733 at paras 4-7 per Lord Nicholls; Freedland, *Employment Contract* 155-156; Barmes (n 4) at 37-38; B Hepple, *Rights at Work: Global, European and British Perspectives* (2005) 52.

breach of the ITMT&C of the employment contract. However, the employee was himself in anterior repudiatory breach, having breached the ITMT&C prior to his employer's repudiatory breach. When the employee's conduct breached the employment contract the employer failed to accept the employee's breach and terminate the employment contract. Hence, the employee's own repudiatory breach of contract was still in play when he claimed constructive dismissal. The central issue in *McNeill*⁷ was whether the employee's failure to come to the court with "clean hands" prevented him from founding on his employer's subsequent repudiatory breach by virtue of the doctrine of mutuality of contractual obligations.

In the Employment Appeal Tribunal ("EAT")⁸ Lady Smith held that the employee could not establish a statutory constructive dismissal under section 95(1)(c) and that he could not terminate the employment contract. Since he was in anterior repudiatory breach of contract Lady Smith invoked the doctrine of mutuality of contractual obligations in order to prevent him from (i) demanding performance from the employer and (ii) accepting its subsequent repudiatory breach as bringing the contract to an end. The mutuality doctrine was articulated by Stair⁹ as meaning that in mutual contracts "neither party should obtain implement of the obligations to him, till he fulfil the obligations by him". However, in the Inner House, Lord Drummond Young allowed the appeal from the decision of the EAT on the basis that the mutuality doctrine had no application to the case. The point was made that the employee was not seeking to *implement or enforce* the terms of his employment contract by terminating it and claiming constructive dismissal on the grounds of the employer's repudiatory breach of the ITMT&C, since he was not seeking to compel the employer to perform the "substantive obligations" of the contract.¹⁰ The "substantive obligations" were described as the employer's obligation to provide a reasonable or minimum amount of work and to pay for it and the employee's corresponding obligation to perform the work when furnished by the employer, i.e. the "work-wage" bargain.¹¹ Lord Drummond Young was of the view that the EAT had adopted the doctrine of mutuality of obligation in a novel albeit wholly unwarranted way to rule that where there are two guilty parties in a contract the party who was first at fault cannot accept the faulty performance of the other's counterpart obligation so as to bring the contract to an end. This conflicted with the standard operation of the doctrine, whereby "a guilty party is prevented from demanding [implement,

7 Other legal points were addressed but this note is restricted to considering the mutuality issue. For example, it was held that the rules relating to the statutory concept of constructive dismissal under section 95(1)(c) should be governed by the proper law of the employment contract rather than English contract law at the time of the decision in *Western Excavating*, see *McNeill* at 117-118 per Lord Drummond Young (with Lord McGhie dissenting at 129-130).

8 *Aberdeen City Council v McNeill* [2010] IRLR 374.

9 *Inst* 1.10.17.

10 Lord Drummond Young's formulation in *McNeill* means that Lord Jauncey's *obiter dictum* in *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 at 1216L that he "did not consider that ... any material breach by one party to a contract necessarily disentitles him from enforcing any and every obligation due by the other party" ought to be treated with some caution.

11 *McNeill* at 121.

enforcement, performance or] fulfilment of the obligations in which he is a creditor, unless he has performed, or is prepared to perform, the obligations which he is himself undertaking and in which he is a debtor".¹² Lords Eassie and McGhie agreed with this analysis.¹³

B. THE MUTUALITY DOCTRINE

In *Inveresk plc v Tullis Russell Papermakers Ltd*¹⁴ Lord Hope endorsed Lord Drummond Young's description of the doctrine of mutuality in *Hoult v Turpie*,¹⁵ namely that it has "generally been given a wide scope in Scots law, [being] ... derived from the *exceptio non adimpleti contractus*"¹⁶ defence. The doctrine affords two principal remedies to an innocent party where the counterparty is in repudiatory breach of contract, namely rescission and retention. In *McNeill*, the employer had neither responded to the employee's repudiatory breach by accepting it and terminating/rescinding the employment contract, nor had the employer sought to retain any of the substantive obligations of the contract, i.e. its obligation to furnish a reasonable or minimum amount of work and pay for it, by suspending the employee in response to his repudiatory breach. Instead the employer had purported to withhold its obligation to preserve trust and confidence under the ITMT&C in a manner which purported to deny the employee in anterior repudiatory breach the right to bring the contract to an end. Lord Drummond Young took the view that (i) the remedy of rescission was of no relevance in the case and (ii) the doctrine of retention did not apply¹⁷ since the employer could not temporarily withhold/retain its own performance of the ITMT&C, which could not be categorised as a substantive obligation.¹⁸

[whilst the ITMT&C] affects the way that the parties act in performing their substantive duties ... it is conceptually distinct [and therefore] ... if there is a sufficiently material breach of contract by the employee, the employer will be justified in suspending employment and not paying salary or wages, but will not be justified in going further and performing acts that are calculated to destroy or seriously damage the relationship of mutual trust and confidence.

The justification for holding that the ITMT&C was not a substantive obligation was two-fold. First, this proposition was motivated by the concern that to find otherwise would enable the employer to take any prior repudiatory breach by the employee and use it as a means of treating the employee in a "wholly outrageous manner, without

¹² *Forster v Ferguson & Forster, Macfie & Alexander* 2010 SLT 867 at 874-875 per Lord Clarke.

¹³ *McNeill* at 114 and 129.

¹⁴ [2010] UKSC 19, 2010 SC (UKSC) 106.

¹⁵ 2004 SLT 308.

¹⁶ *Inveresk* at 122 per Lord Hope.

¹⁷ Although the employer had failed to accept the employee's breach and rescind, and it could not retain performance of its obligations under the ITMT&C, it was not left without a remedy since it still retained the right to raise proceedings against the employee to claim damages for breach of contract.

¹⁸ *McNeill* at 121.

any redress” which would “promote unfairness”.¹⁹ From the perspective of worker protection, which the statutory regime of unfair dismissal was intended to achieve and the significance of which was recently stressed by the Supreme Court,²⁰ this aspect of Lord Drummond Young’s judgment is to be commended. The second justification was that it was of no relevance to the achievement of the objective of the remedy of retention, namely to secure future contractual performance.²¹

It is the latter point, namely that the ITMT&C is not a substantive obligation, that is controversial and arguably conceptually inapt, particularly insofar as it suggests that the ITMT&C imposes somehow inferior obligations to those established by the work-wage bargain.²² In light of the fact that the ITMT&C has been described variously as (a) an “overarching obligation implied by law as an incident of the contract of employment”;²³ (b) assuming a “central position in the law of the contract of employment”;²⁴ (c) being “undoubtedly the most powerful engine of movement in the modern law of employment contracts”;²⁵ and (d) forming the “cornerstone of the legal construction of the contract of employment”,²⁶ this strand of Lord Drummond Young’s reasoning is perhaps suspect. It is also controversial for another reason. For example, consider the situation where an employee – such as McNeill – commits a repudiatory breach of the ITMT&C. In this context, one must question whether the position that the employer cannot retain performance of the same obligation is plausible bearing in mind that reciprocity is the principal hallmark of the implied term. In *Inveresk* both Lords Hope and Rodger ruled that the doctrine of retention applied in respect of obligations which were the counterparts of each other, and that where the obligation breached by the guilty contractor and the obligation withheld by the innocent party arise under the same contract, it will be assumed that they are the counterparts of each other.²⁷ However, *McNeill* seems indirectly to reintroduce the pre-*Inveresk* practice of forensically examining whether the obligations breached and retained are indeed counterparts, notwithstanding that they were imposed under the same contract. For example, in *McNeill* it was held that an employer cannot suspend performance of its obligation to maintain trust and confidence in the teeth of a breach of the employee’s obligations imposed by the ITMT&C. One wonders if there is not so much distance between that position and saying that these obligations cannot be

19 *McNeill* at 121.

20 *Gisda Cyf v Barratt* [2010] UKSC 41, [2010] 4 All ER 851 at 863a per Lord Kerr.

21 *McNeill* at 120. As such, the underlying purpose of retention is to provide interim security to the innocent party as a means of securing future contractual performance from the guilty counterparty.

22 However, it is consistent with the decision of the EAT in *Standard Life Health Care Ltd v Gorman* [2010] IRLR 233 that there is no longer any obligation on the employer to provide work to the employee where the latter is in repudiatory breach. This aspect of the decision in *McNeill* means that the element of the decision of the High Court in *RDF Media Group Plc v Clements* [2008] IRLR 207 which ruled that the implied term could be retained does not form part of Scots law.

23 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 536A per Lord Steyn.

24 D Brodie, “Mutual trust and the values of the employment contract” (2001) 30 Industrial LJ 84 at 86.

25 Freedland, *Employment Contract* 166.

26 H Collins, *Employment Law*, 2nd edn (2010) 106.

27 *Inveresk* at 124-125 per Lord Hope and 132-133 per Lord Rodger.

equated as counterparts which would appear strained as the obligations derive from the same reciprocal implied term.

The decision in *McNeill* raises additional issues. The first concerns the legal position if the employer responds to the employee's repudiatory breach of the ITMT&C by withholding performance of the substantive obligation to provide work to the employee and pay for it. The essence of the situation here is that the employer suspends the employee. An important question is whether the employer would be entitled to withhold payment on the basis that the employee is not working. Logically one might argue that pay can be withheld relying on the brocard "no work, no pay"²⁸ or, more evocatively, "the consideration for work is wages, and the consideration for wages is work".²⁹ Indeed, Lord Drummond Young explicitly states that the employer will be entitled to withhold wages when it suspends the employee.³⁰ However, the common law unequivocally says otherwise: the employee must continue to be paid if he or she is ready and willing to work, albeit not actually working.³¹ This will undoubtedly be the case when the employee is suspended. A second matter is whether it is possible for the employer to maintain and preserve trust and confidence whilst the work-wage bargain is effectively suspended. This is the effect of the notion in *McNeill* that the substantive obligation of the employment contract enjoining the employer to provide work is temporarily withheld, whilst the employer's obligation of trust and confidence under the ITMT&C continues. At the point of suspension, it is not obvious that harmonious relations between the employer and employee can be maintained to any meaningful and durable extent. The saliency of this point is underscored by the number of cases in which it has been held that the employer's power of suspension was exercised in breach of the implied term.³²

Notwithstanding these reservations about the decision in *McNeill*, Lord Drummond Young's position has the attraction of being consistent with the Scottish Law Commission's understanding of the legal position.³³ Furthermore, it is compatible with the elective theory of termination of the employment contract endorsed by the Supreme Court in *Société Générale (London Branch) v Geys*.³⁴ For instance, where an employee such as *McNeill* is in anterior repudiatory breach of contract he or she is not deprived of his or her right of election, i.e. whether to accept the employer's subsequent repudiatory breach of contract and "terminate" the employment contract or alternatively to affirm the employment contract whereupon

28 *Luke v Stoke-on-Trent City Council* [2007] ICR 1678 at 1685E per Mummery LJ.

29 *Browning v Crumlin Valley Collieries Ltd* [1926] 1 KB 522 at 528 per Greer LJ.

30 *McNeill* at 121.

31 *Cuckson v Stones* (1858) 1 E & E 248; *Miles v Wakefield* [1987] AC 539 at 561A–B and 564G–565B per Lord Templeman; *Miller v Hamworthy Engineering Ltd* [1986] IRLR 461; *BT v Ticehurst* [1992] ICR 383; and *Beveridge v KLM (UK) Ltd* [2000] IRLR 765 at 766 per Johnston J.

32 See *Gogay v Hertfordshire County Council* [2000] IRLR 703; *Milne v Link Asset & Security Co Ltd* [2005] All ER (D) 143 (Sep); *TFS Derivatives Ltd v Morgan* [2005] IRLR 246; and *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402 at 409–410 per Elias LJ.

33 See "Report on Remedies for Breach of Contract" (Scot Law Com No 174) para 7.13, available at <http://www.scotlawcom.gov.uk/publications/reports/1990-1999/>.

34 [2012] UKSC 63, [2013] 1 AC 523.

it continues. If the opposite conclusion had been reached in *McNeill*, this would have precluded the employee from exercising his or her right of election in such a manner.³⁵ As such, the elective theory would have been reduced to an empty concept.

C. CONCLUSION

Unlike some other recent key decisions in the field of employment law,³⁶ *McNeill* is one where policy considerations were overlooked in favour of the application of orthodox contractual principles. The assertion that the law of constructive dismissal should be consistent in England and Scotland was rejected and the Scots law doctrine of mutuality of contract was applied to enable an employee in repudiatory breach to terminate the employment contract. As such, employment protection was enhanced. Although the effect of the decision is that the legal position differs north and south of the border this may be no bad thing, particularly in light of the ripples that an opposite conclusion could have generated for the coherence of doctrinal principles of Scots contract law.

David Cabrelli
University of Edinburgh

EdinLR Vol 18 pp 265-270

DOI: 10.3366/elr.2014.0210

The Power to Increase Sentence *Ex Proprio Motu* on Appeal

The recent case of *Murray v HM Advocate*¹ is a rare example of the High Court utilising its power to increase the sentence of an offender who challenges its “excessiveness” on appeal. *Murray* has already attracted attention for the way in which the High Court dealt with sentence discounting for guilty pleas,² but the ability of

35 For a detailed explanation of this point, see D Cabrelli and R Zahn, “The elective and automatic theories of termination in the common law of the contract of employment: conundrum resolved?” (2013) 76 Modern LR 1106 at 1118.

36 See *Johnson v Unisys Ltd.* [2001] UKHL 13, [2003] 1 AC 518, where principle gave way to policy. Here, the ITMT&C was held to be of no application to an employee’s dismissal by the more pressing policy-oriented factor that the common law should not be expanded in such a way as to outflank the intention of Parliament in promulgating the statutory scheme for unfair dismissal. This was taken further in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22, where, in the teeth of the same policy consideration referred to in *Johnson*, one of the most axiomatic doctrines of the liberal common law system was abandoned, namely that where express terms are breached this should sound in an action for damages.

1 [2013] HCJAC 3.

2 See F Leverick, “The rise and fall of the sentence discount” 2013 SLT (News) 259.